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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-927

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Petitioner,

v.

INVESTMENT COMPANY INSTITUTE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BANKAMERICA CORPORATION AND WESTERN BANCORPORATION, AND OF THE NEW YORK CLEARING HOUSE ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This *amici curiae* brief is submitted in support of the petition for a writ of certiorari, which seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit. That decision is contained in the Appendices to the petition ("App.").

INTEREST OF *AMICI*

This brief is respectfully submitted by BankAmerica Corporation and Western Bancorporation ("*amici* bank holding companies") and The New York Clearing House Association ("Clearing House") with the consent of all parties to this case, pursuant to Rule 42(1) of the Rules of this Court. Both of the *amici* bank holding companies are subject to regulation by the Federal Reserve Board ("Board") and each has a non-bank subsidiary that provides various services, including the rendering of investment advice, to a registered closed-end investment company.[1] The Clearing House is an association of 12 major commercial banks, each of which is owned by a bank holding company subject to regulation by the Board.[2] The bank holding company parents of the Clearing House members (or their affiliates) either provide services to closed-end investment companies or may wish to provide such services in the future.

The decision below invalidated an eight-year-old Board regulation and interpretative ruling[3] that permits non-bank subsidiaries of bank holding companies to provide certain investment-related services to closed-end investment companies, pursuant to Section 4(c)(8) of the

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[1] A closed-end investment company typically does not issue shares after its initial organization and does not stand ready to redeem them. An open-end investment company (or mutual fund), on the other hand, is continuously issuing shares and stands ready to redeem those shares. 12 C.F.R. § 225.125(c); *see* App. at 84a.

[2] The Clearing House's members are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Bank of North America, and European American Bank & Trust Company.

[3] 12 C.F.R. § 225.4(a)(5)(ii), *as interpreted in* 12 C.F.R. § 225.125 (1978) (App. 80a-87a).

Bank Holding Company Act, 12 U.S.C. § 1843(c)(8). The decision will have an immediate and adverse impact upon bank holding companies that render such services to closed-end investment companies. Moreover, it raises substantial doubts as to what other investment-related services the Board may permit bank holding companies and their non-bank subsidiaries to perform pursuant to Section 4(c)(8). *Amici* thus have a special interest in and perspective regarding the decision that is shared by neither of the parties.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law regarding the interpretation of the Bank Holding Company Act[4] and the Glass-Steagall Act,[5] the regulatory authority of the Board under those statutes, and the appropriate roles of the commercial banking and investment banking communities. Review is required because the court of appeals wrongly decided these questions, with serious consequences. In particular, the decision below: confuses the relationship between the Bank Holding Company Act and the Glass-Steagall Act; unduly restricts the statutory authority of the Board to determine what activities are "closely related to banking" for purposes of Section 4(c)(8), and thus permitted to bank holding companies; limits competition in the furnishing of investment-related services; raises serious doubts as to what other services bank holding companies can offer; undercuts the justified reliance that bank holding companies have heretofore placed—and should be able to continue to place—on the Board's determinations under

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[4] 12 U.S.C. §§ 1841, *et seq.*; *see* App. at 90a-91a.

[5] Act of June 16, 1933, ch. 89, 48 Stat. 162. The provisions of the Glass-Steagall Act at issue here, Sections 16, 20, 21, and 32, respectively, are codified at 12 U.S.C. §§ 24 (Seventh), 377, 378, and 78; *see* App. at 88a-90a.

Section 4(c)(8) of the Bank Holding Company Act; and creates confusion with respect to the Glass-Steagall Act's regulatory differentiation between the roles of commercial bankers and investment bankers.

1. Section 4(c)(8) broadly authorizes the Board to permit bank holding companies and their non-bank subsidiaries to engage in activities which the Board "after due notice and opportunity for hearing has determined . . . to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." Acting pursuant to this broad authority, the Board in 1972 adopted the instant regulation and interpretative ruling, which in general permit bank holding companies and their non-bank subsidiaries to organize, manage, or otherwise serve as investment advisers to closed-end investment companies.[6] The Board's action imposed specific restrictions designed to assure that the authorized activities of bank holding companies remain well within the ambit of lawfulness under the Glass-Steagall Act, which in effect prohibits a bank holding company or its affiliates from being engaged "principally" in the "issue, flotation, underwriting, public sale, or distribution" of securities. 12 C.F.R. §§ 225.125(d)-(i). The Department of Justice contemporaneously lauded this action as "pro-competitive" (App. 7a n. 11).

The court of appeals did not quarrel with the Board's conclusion that the various investment services at issue were "closely related to banking." The court found no provision of the Glass-Steagall Act to have been violated,

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[6] Specifically, the Board ruled that:

> "a bank holding company may exercise all functions that are permitted to be exercised by an 'investment adviser' under the Investment Company Act of 1940, except to the extent limited by the Glass-Steagall Act provisions, as described, in part, hereinafter." 12 C.F.R. § 225.125(d) (App. 84a-85a).

and specifically rejected the investment company industry's argument that Sections 16 and 21 of the Glass-Steagall Act forbade the Board's action (App. 14a-23a). Nevertheless, the court concluded that the Board's regulation contravened the "policies" of the Glass-Steagall Act, which "carry forward and inform the meaning of" the Bank Holding Company Act, to limit what the Board may authorize under Section 4(c)(8), even though neither the Glass-Steagall Act nor Section 4(c)(8) independently contain such limits (App. 23a-25a).

2. Not only is the court of appeals' approach logically inconsistent, but its decision is wrong as a matter of statutory construction and sound banking policy. Contrary to the plain language and legislative history of Section 4(c)(8),[7] the court of appeals' decision would greatly extend the reach of Glass-Steagall by premising a violation of Section 4(c)(8) solely upon Glass-Steagall "policies" even where—as here—the Glass-Steagall Act itself has not been violated and the purportedly applicable policies are nowhere explicitly defined. By thus extending the prohibitions of Glass-Steagall far beyond the limits that Congress itself carefully set for the legislation, *see Board of Governors* v. *Agnew*, 329 U.S. 441, 447-48

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[7] There is nothing to support the court of appeals' conclusion either in the plain language or legislative history of the predecessor to Section 4(c)(8) passed in 1956, or in the plain language or legislative history of Section 4(c)(8) itself. What the legislative history of the 1970 amendment that produced Section 4(c)(8) does show is that the Conference Committee deleted a proposed specific prohibition of the operation by bank holding companies of closed-end investment companies, *see* H.R. Rep. No. 1747, 91st Cong., 2d Sess. 13-14 (1970); the court of appeals conceded that this deletion seemingly constituted "a specific endorsement of the Board's action challenged in this case" (App. 38a). The legislative history also demonstrates that the 1970 amendment was intended *not* to change existing law in this area, *see* 116 CONG. REC. 42430 (1970) (colloquy between Senators Sparkman and Williams; the Board's action here, of course, was carefully designed to conform to existing law, *i.e.*, the Glass-Steagall Act.

(1947), the court of appeals has engaged in judicial legislation and improperly limited the power of the Board.[8]

3. The court of appeals' decision effectively alters the nature of the Board's role—and that of reviewing courts —under Section 4(c)(8). As amended in 1970, Section 4(c)(8) was intended to allow the Board substantial latitude in determining whether specific activities are "closely related to banking." The court of appeals thus should have deferred to the Board's construction of its statutory mandate, *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978), particularly since the Board specifically tailored its determination to accommodate the requirements of the Glass-Steagall Act. However, instead of deferring and, indeed, without questioning the Board's determination that the investment services at issue here are "closely related to banking," the court ruled as a matter of law that the Board had no statutory authority to make that determination. The court of appeals thus effectively withdrew a portion of the authority that Congress granted the Board to make "closely related" determinations under Section 4(c)(8), and it substituted for the statutory criterion a vague new securities-related standard with respect to which reviewing courts may always second-guess the Board. The court of appeals thereby interpreted the scope of the Board's authority in a manner inconsistent with the decision of several courts of appeals that recognize the latitude to be given Section 4(c)(8) determinations.[9]

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[8] *See Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535-58 (1978).

[9] *Association of Bank Travel Bureaus* v. *Board of Governors*, 568 F.2d 549, 552 (7th Cir. 1978); *Alabama Ass'n of Ins. Agents* v. *Board of Governors*, 533 F.2d 224, 235 (5th Cir. 1976), *modified*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1237 (D.C. Cir. 1975).

4. Moreover, the standard adopted by the court of appeals confounds the distinctions between commercial banking and investment banking that Congress painstakingly drew in the Glass-Steagall Act. In the core provisions of that Act—Sections 5, 16, and 21, respectively—Congress prohibited commercial banking institutions from dealing in securities for their own account or underwriting issues of securities, in order to exclude such institutions from the distribution and market-making functions traditionally performed by investment bankers. The court of appeals' opinion, however, may be read to suggest that commercial banking institutions are prohibited from engaging in any "securities activities," whatever the court considered those to be. Such a theory has nothing in common with either the language or the purpose of the Glass-Steagall Act, and—unless reviewed by this Court—can serve only to confuse the functional delineations between commercial and investment banking firms that have heretofore been clear.

5. In sum, the court of appeals' decision will not only restrict the amount and quality of investment-advisory services available to consumers of such services, but it will also expand the reach of the Glass-Steagall Act beyond the limits set by Congress, and thoroughly confuse the provisions of two banking statutes that Congress designed to perform very different functions. The decision thus has created serious uncertainty concerning what investment-related services *amici* and others can perform pursuant to the Bank Holding Company Act and what activities the Board may authorize for the future. The decision below was wrong, and, if left unreviewed, will have significant and pernicious effects upon the market for investment services and upon banking regulation in this country.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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